Contents

List	face t of Abl ple of C		itions	v xvii xxv
	2			AAV
Int	roduct	ion		1
1	Key	Aspe	ects of Set-off	7
	Ι	De	finition	7
	II	Sig	gnificance and Functions of Set-off	9
		Α	Set-off as a Means of Economic Efficiency	9
		В	Set-off as an Equitable Instrument	10
		С	Set-off Providing Security	11
	III	Sig	nificance of Set-off in Modern Business Life	12
		Α	Set-off Agreements in Banking Law	12
		В	Importance of Unilateral Set-off	13
	IV	Mo	odern Problems with Set-off	14
		А	Jurisdictional Questions	14
		В	Choice-of-law Questions	18
	V	Ter	rminology	19
		А	'Set-off' Versus 'Compensatio'	19
		В	'Set-off' Versus 'Counterclaim'	20
		С	'Cross-claim', 'Cross-demand', and	
			'Counter-demand'	22
2	Set-	off in	n a Comparative Survey	23
	Ι	Inc	cipiencies: Roman Law	23
		А	Introduction	23
		В	Development	24
		С	Operation of Set-off in Roman Law-The Various	s
			Stages	26
			i Iudicia Bonae Fidei	26
			ii Iudicia Stricti Iuris	28
			iii Special Cases	29
			iv Set-off Under Justinian	30
			a Development of the Roman Post-classical	
			Judicial System	30

viii Contents

Π

		b Ex officio Compensatio?	31
		The Dispute over 'Ipso Iure Compensatur'	31
		The Significance of the Ipso Iure-Dispute	
		in the 21st Century	32
		c Allegation of Fact or Submission of Claim?	33
		d The Requirement of Ascertained Claims	
		('Liquidity') as a Tool of Discretion	34
		e Connectivity and Similarity of Claim and	
		Cross-claim?	34
D	Oł	bservations and Comments	35
	i	Set-off as a Procedural Mechanism in	
		(Pre-)Classic Roman Law	35
	ii	Set-off Asserted in Court: Assertion of a	
		Countervailing Right or Assertion of a Fact?	36
	iii	0 0	36
		Summary and Outlook	37
Set		in the Romanic Legal Systems	37
A		istorical Development	38
11	i	Introduction	38
	ii	Customary Law	39
		Canon Law	42
		Written Law	43
	v		43
В		t-off Under the Code Civil (Compensation	-15
D		gale)	45
	i	Operation Ipso Iure?	45
	ii	Requirements	47
	11	a Ascertainment of Claims (Liquidity)	47
		Uncertainties Regarding the Degree of	-17
		Ascertainment	47
		Uncertainties Regarding the Relevant	47
		Point in Time	49
			49 50
			51
		, e	51
		d Enforceability of Primary Claim and Cross-claim	50
			52
		e Set-off Must Not Be Excluded by Law or	52
		by Agreement	53
		f The Role of Connectivity of Primary Claim	F 4
		and Cross-claim	54
	iii	8	55
C	iv	Summary	55
С		t-off by Agreement (Compensation	
	Co	onventionelle)	56

III

Contents ix

D		icial Set-off (Compensation Judiciaire) =	
	Соι	unterclaim	56
Е	Set-	-off in Other Romanic Legal Systems	59
	i	Overview	59
	ii	Automatic Extinction of Concurring Debts	59
	iii	Ascertainment of Claims	61
G	Sun	nmary	61
Set	-off i	n the Germanic Legal Systems	62
А	His	torical Development	63
В	Set-	-off in the German Codification	65
	i	Operation by Extra-judicial Declaration	66
		a Principal Rule	66
		b Set-off Declaration in Court	
		(Prozessaufrechnung)	66
		Set-off Brought in Court as an Allegati	on
		of Fact	66
		Set-off Brought in Court as an Assertic	on
		of a Right	67
	ii	Requirements of Set-off	69
		a Reciprocity	69
		b Similarity of Obligations	70
		c Validity, Maturity, and Enforceability of	
		Cross-claim	72
		The Principle	72
		Statute of Limitations	72
		Enforceability of Cross-claim Only	73
		d Obstacles to Set-off	74
		e Ascertainment of the Cross-claim?	75
		f Connectivity of Primary Claim and	
		Cross-claim?	76
		g Interplay of Ascertainment and	
		Connectivity of Claims	77
	iii	Retroactive Effect of Set-off	78
С	Set-	-off in Switzerland	79
	i	Historical Development	79
	ii	Operation by Extra-judicial Declaration	81
		a Principal Rule	81
		b Set-off Declaration in Judicial Proceedin	gs
		(Prozessaufrechung)	81
	iii	Requirements	82
		a Reciprocity	82
		Principal Rule	82
		Exceptions	83

x Contents

IV

		b Similarity of Obligations	84			
		Money Debts	84 84			
		Other Obligations	84 85			
		e	05			
		c Validity, Maturity, and Enforceability of Cross-claim	95			
			85			
		d Obstacles to Set-off	87			
		e Not Required: Ascertainment and	07			
		Connectivity of Claims	87			
D	iv	Retroactive Effect of Set-off	89			
D		mmary of German and Swiss Law of Set-off	89			
Е		-off in Austria	90			
	i	Introduction	90			
	ii	Set-off ipso iure?	91			
	iii	1	92			
		a General Overview	92			
		b In Particular: Ascertainment of				
		Cross-claim Required?	94			
	iv	Effect of Set-off	95			
	v	Summary	95			
F	Jur	isdictions with Similar Set-off Concepts	97			
G	Set	-off by Agreement	97			
Н		ounterclaim				
Ι	Su	nmary	99			
Set-	off i	n England and English-based Jurisdictions	100			
А		tutory Set-off	101			
	i	History	101			
	ii	Operation	102			
	iii	Requirements	103			
		a Mutuality	103			
		b Money Debts	104			
		c Ascertainment of Claims	105			
		d Maturity and Limitation	106			
		e Obstacles to Set-off	106			
		f Not Required: Connectivity	107			
	iv	Effect of Statutory Set-off	108			
	v	Summary	108			
В		atement	109			
2	i	Historical Development	109			
	ii	Scope of Application	110			
	iii		110			
	iv	Ascertainment of Claims	110			
	v	Operation	111			
	v vi	Summary and Practical Significance	111			
	V I	Summary and Fractical Significance	111			

3

Contents	xi
Contentis	AI

	С	Equitable Set-off	112
		i Introduction	112
		ii Operation	113
		iii Requirements	114
		a General Prerequisites; 'Arising Out of the	
		Same Transaction'	114
		b The 'Equity' Element	115
		c Ascertainment of Claims	116
		d The 'Equity Element' and Liquidity as	
		Discretionary Instruments	116
		iv Effect	117
	D	Relevance of Court Rules	117
		i Mere Regulation of Practice and Procedure	117
		ii Misunderstandings in Case Law	118
	Е	Contractual Set-off	120
	F	Counterclaim	121
	G	Summary	121
V	Co	mparative Analysis	123
	А	Set-off as a Mainly Substantive Instrument	123
	В	Broad Spectrum of Complex Rules	124
		i Different Operation Mechanisms	124
		a The <i>ipso iure</i> Operation	125
		b The Self-help or Declaration Mechanism	125
		c The Judicial Mechanism	126
		ii Requirements of Set-off in Comparison	126
		iii Possible Effects of Set-off	127
	С	Conclusions	127
Set-	off in	the Conflict of Laws	129
I.		termination of the Applicable Law in International	
		bitration	129
	А	Development and Current Theories	129
		i Application of the Lex Loci Arbitri	129
		ii Application of the Conflict of Laws Rules	
		Which the Tribunal Considers Appropriate	131
		a Development	131
		b Application of the Choice-of-law Rules at	
		the Seat of Arbitration	132
		c Cumulative Application of All Conflicts	
		Rules Involved in the Dispute	133
		d Application of 'General Principles of	
		Private International Law'	133
		iii Application of the (Substantive) Law Which	
		the Tribunal Considers Appropriate	134

xii Contents

		a	a The Principle	134		
		ł	Application of a Specific National Law	135		
		(c Application of More Than One National			
			Law (tronc commun)	135		
		(d Application of A-National Rules of Law	135		
	В	Com	parison of Law-determination Methods in			
		Arbi	tration and State Court Proceedings	136		
II	Lav	v-deter	rmination for Set-off in Classic Conflict			
	of l	laws		138		
	А	Appl	lication of the Lex Fori	139		
		i l	England	140		
		ii U	United States	141		
	В	Appl	lication of the Law of the Primary Claim	142		
		i S	Switzerland	142		
		ć	a Principal Rule	142		
		ł	Primary Claim Arising Out of a Contract	143		
		C	c Primary Claim Not Arising Out of a			
			Contract	143		
		ii l	EC-Regulation on the Law Applicable to			
			Contracts (Rome I)	144		
	С	Cum	nulative Approach	146		
		i l	Introduction	146		
		ii 7	The Original Concept and Its Variations	148		
	D		er Models	150		
			Application of the Law of the Claim Which			
			Existed First	150		
			Application of the Law of the Claim Which			
			Arose Second	150		
			Application of the Lex Loci Solutionis	151		
			Application of the More Set-off Friendly Law	151		
III	Criteria for a Suitable Rule to Determine the Law					
			e to a Set-off in International Arbitration	152		
	А		pecting Party Autonomy	153		
	В		uring Predictability	153		
	С		inating the Possibility of Manipulative Tactics	153		
	D		ancing Practicability	154		
	E		riding Comprehensiveness	154		
	F		aching Appropriateness	154		
			Appropriateness' in Classic International			
			Contract Law—European Traditionalism and			
			American Theories	154		
			Appropriateness' of Choice-of-Law Rules in			
		1	International Arbitration	157		

		iii	'Appropriateness' with Regard to	
			Choice-of-Law Rules for Set-off in	
			International Arbitration	158
			a Choice-of-law Fairness Considerations in	150
			the Traditional Conflicts Rules	158
			b Possible Fairness Considerations When	
			Determining the Law in International	150
			Arbitration	158
			Introduction	158
			Functions of Set-off	158
13.7	D:		Conclusions	159
IV	Disc Set-		on of Classic Choice-of-Law Rules With Regard to	160
	A A		e <i>Lex Fori/Lex Loci Arbitri</i> Approach Under	160
	Λ		utiny	161
		i	Practicability	161
		1	a In State Court Proceedings	161
			b In International Arbitration	161
		ii	Predictability	162
		iii		163
		iv	Appropriateness?	164
		v	Summary	166
	В		e Primary Claim Approach Under Scrutiny	167
	2	i	Predictability and Practicability?	167
		-	a Depending on Contingencies	167
			b Appropriate for Other Set-off Concepts?	168
			Judicially Operating Set-off	168
			Ipso iure Set-off	169
			c Aspects Governed by the Primary Claim's	
			Law	170
			d Foreign Law of Set-off Partially Settled in	
			Substantive and Partially in Procedural	
			Law	171
		ii	Elimination of Manipulation?	172
		iii	Appropriateness	172
		iv	Summary	173
	С	The	e Cumulative Approach Under Scrutiny	174
		i	Introduction	174
		ii	Practicability	175
		iii	Predictability and Elimination of Manipulative	
			Tactics	175
		iv	Appropriateness	176
	D		e Theory of Applying the Law of the Claim	
		Wh	ich Existed First Under Scrutiny	177

Contents xiii

xiv Contents

V

Е	The Doctrine of Applying the Law of the Claim	
	Which Arose Second Under Scrutiny	177
F	The Application of the Lex Loci Solutionis Under	
	Scrutiny	178
G	The Proposal to Apply the More Set-off Friendly	
	Law Under Scrutiny	178
Н	Conclusions	179
Otl	her Choice-of-Law Solutions in International	
Arł	bitration	180
А	The Cumulative Application of Conflicts Rules	180
В	The Tronc Commun Approach	182
С	Application of A-National Law	183
	i Introduction	183
	ii The ICC Case No 3540 of 1980	184
D	Discussion of the Tronc Commun Approach and	
	the Application of A-National Law	185
	i Appropriateness	185
	a Undisguised Consideration of Substantive	
	Appropriateness Criteria	185
	b Avoidance of 'Nationalisation' of the	
	Dispute	186
	ii Practicability, Predictability and Avoidance of	
	Manipulation Tactics	188
	a 'Ad Hoc Distillation' of Similarities Versus	
	One Unvarying General Principle of	
	Set-off as the Basic Question	188
	b Advantages of Ad Hoc Distillation	188
	c Disadvantages of Ad Hoc Distillation	188
	ICC Case No 5971: an Illustrative	
	Example	188
	Temptation to Oversimplify	190
	Temptation to Misinterpret	190
	d Progressive Summary	191
	e Advantages of Advanced Voie Directe	191
	f Disadvantages of Advanced Voie Directe	192
	g Summary	194
Е	Fleshing Out a Uniform Set-off Concept	194
	i The 'Creeping' Codification of General	
	Principles	194
	ii Overview of Laws and Sets of Rules Based on	
	Comparative Analysis	198

JOBNAME: Fountoulakis PAGE: 9 SESS: 11 OUTPUT: Fri Oct 29 08:32:57 2010

Contents xv

		а	UNIDROIT Principles (PICC), Principles	
			of European Contract Law (PECL), and	
			Draft Common Frame of Reference	
			(DCFR)	198
			Introduction	198
			Operation of Set-off	200
			Requirements	201
			Similarity	201
			Reciprocity	201
			Performability of the Primary Claim,	
			Maturity of the Cross-claim	202
			Exclusion and Waiver of the Right of	
			Set-off	203
			Liquidity and Connectivity	203
			Effect	204
		b	The Principles of the Gandolfi Group	204
		с	The Netherlands NBW	205
		iii Co	omparative Analysis	206
		a	Operation of Set-off	206
		b	Similarity, Reciprocity, Enforceability of the	
			Claims	206
		с	Exclusion of Set-off	208
		d	Liquidity and Connectivity	209
		e	Effects of Set-off	211
		f	Results	213
	VI	Summary		214
4	Con	clusions		216
5	Fina	l Summary		219
Bibl	iograpi	hy		229
Inde	ex			000

Columns Design Ltd / Job: Fountoulakis / Division: citi /Pg. Position: 9 / Date: 27/10